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No. 97-65

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT H. YOUNG, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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27 pp

QUESTIONS PRESENTED

1. Whether the common-law doctrine first articulated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), has been statutorily supplanted with respect to claims based on transactions that occurred before the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

2. Whether petitioners' claims against the Federal Deposit Insurance Corporation as receiver of a failed bank are barred by the *D'Oench, Duhme* doctrine as it was applied before the enactment of FIRREA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 103 F.3d 1180. The opinions and orders of the district court (Pet. App. 30a-32a, 33a-48a, 49a-61a, 62a-71a, 89a-119a) are unreported. The district court order of October 16, 1992 (Pet. App. 72a-88a) is reported at 816 F. Supp. 1070.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. 120a-121a. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a complicated attempt by petitioners to secure $600 million in financing for the purchase of oil and gas properties. Pet. App. 2a-6a. As directly relevant here, petitioner Young sought to provide security for a loan by entering into a surety contract with Swiss-American Fidelity Insurance Company and Guarantee, Limited (SAFIG). *Id.* at 3a.[1] To fund the deposit required to secure a binder on the surety bond, petitioner Young arranged for Northpark National Bank (NPNB) to issue a $550,000 letter of credit in favor of SAFIG. *Ibid.* The deposit was to be refundable until he authorized issuance of the bond. *Id.* at 4a.

After a related entity unsuccessfully attempted to cash the NPNB letter of credit, SAFIG announced that it would require a cash deposit in order to continue with the transaction. Pet. App. 4a. Petitioner Young then arranged a $550,000 loan from NPNB. *Ibid.* He alleges that he agreed to make the cash deposit only because he was assured (i) that his loan from NPNB would be secured by a letter of credit from SAFIG and (ii) that SAFIG's credit was good because it had $12 million on deposit at Hilton Head Bank & Trust, N.A. (the Bank) under a "Trust Deposit Agreement." *Id.* at 4a-5a. In any event, on September 23, 1988, the parties entered into a written escrow agreement, found among the records of the Bank, under which the Bank served as the intermediary for the exchange of the new $550,000 loan proceeds and the original NPNB letter of credit. See *id.* at 5a, 94a-95a; Pet. 10. SAFIG also issued a letter of

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[1] Petitioner Young is the President and Chief Executive of petitioner EDX Holdings, Inc. Pet. App. 2a n.1.

credit for $550,000 in favor of NPNB, payable through the Bank. Pet. App. 4a.

Petitioners contend that, in connection with those transactions, the parties orally agreed that the proceeds of the NPNB loan would remain on deposit at the Bank until SAFIG issued the surety bond, and that the Bank would issue its own letter of credit to secure the $550,000. Pet. 10; Pet. App. 5a. Neither of those alleged agreements is reflected in the escrow papers or in any other document. Pet. App. 5a. In fact, the Bank was directed to transfer the $550,000 to SAFIG, which it did. *Id.* at 5a, 95a. There is no dispute that the transfer was consistent with the terms of the written escrow agreement. *Id.* at 5a. Petitioners also contend that in January 1989 the Bank "confirmed," or agreed to be directly liable on, the letter of credit issued by SAFIG. *Id.* at 6a. Neither the SAFIG letter of credit nor the Bank's purported confirmations were found in the Bank's records. *Ibid.*

Petitioner Young defaulted on his loan to NPNB. Pet. App. 5a. NPNB attempted to collect on the SAFIG letter of credit, but the Bank refused to honor it on the ground that SAFIG did not have sufficient funds on deposit with the Bank. *Id.* at 6a, 96a-97a. Petitioner Young then repaid the NPNB loan. See Pet. 13.

2. Petitioners sued the Bank and various other parties involved in the abortive financing. Pet. App. 6a-7a. Among other claims, petitioners alleged that the Bank was liable for wrongful dishonor of the letter of credit, violation of the South Carolina Unfair Trade Practices Act (SCUTPA), conspiracy and fraud. *Ibid.*

In August 1991 the Bank was declared insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver. Pet. App. 6a n.2. Because all of the claims then pending against the Bank relied on alleged oral agreements, understandings, or representations, or on documents not found in the Bank's own books and records, the FDIC moved for summary judgment on the ground that such claims were barred by the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and by 12 U.S.C. 1823(e).

The district court initially held that *D'Oench* barred any claim for fraud based on unwritten agreements and understandings surrounding the written escrow agreement (Pet. App. 66a), the wrongful dishonor claim based on purported confirmations not found in the Bank's records (*id.* at 69a-70a), and the civil conspiracy based on an alleged but unrecorded agreement to defraud petitioners (*id.* at 66a-67a). The court declined, however, to grant judgment for the FDIC on other claims. *Id.* at 64a-66a, 68a. On the FDIC's motion for reconsideration, the court further held that petitioners' claim under SCUTPA was barred because the only "trade practice" alleged in the complaint was dishonoring SAFIG's letter of credit, a claim barred by *D'Oench*. *Id.* at 56a. In addition, the court found that, even if *D'Oench* did not bar the wrongful dishonor and SCUTPA claims, those claims would fail as a matter of state law. *Id.* at 59a. The court declined to bar petitioners' fraud claim under *D'Oench*, but it indicated that it would certify that issue for interlocutory appeal. *Id.* at 50a-54a. At the same time, the court withdrew its previous judgment on petitioners' conspiracy claim, indicating that

it would certify that issue for appeal as well. *Id.* at 60a.

In December 1994, however, the district court instead granted summary judgment on the remaining fraud and civil conspiracy claims under South Carolina law. Pet. App. 39a-43a. The court held that petitioners could not recover on the remaining fraud claim because there was no fiduciary relationship between petitioners and the Bank officer they claimed had misled them, and because they could not reasonably have relied on the representations allegedly made to them concerning SAFIG's financial condition or the funds it had on deposit at the Bank. *Id.* at 40a-42a. Similarly, the court held that petitioners had failed to adduce evidence to prove the elements of a civil conspiracy under South Carolina law. *Id.* at 42a-43a.

3. The court of appeals affirmed. Pet. App. 1a-29a. The court agreed that petitioners' claims of fraud in connection with the escrow agreement, wrongful dishonor of the SAFIG letter of credit, and violation of SCUTPA were all barred by the *D'Oench* doctrine. *Id.* at 9a-16a. The court rejected petitioners' arguments that *D'Oench* should not apply either because they were innocent of any misconduct (*id.* at 13a-14a) or because their claims were not linked to a specific Bank asset (*id.* at 15a-16a). Because the court found that the common-law *D'Oench* doctrine barred petitioners' claims, it did not address either the potential application of 12 U.S.C. 1823(e) or the district court's alternative state-law grounds for granting summary judgment on the wrongful dishonor and SCUTPA claims. Pet. App. 15a, 16a n.4. The court did affirm the district court's judgment on the civil conspiracy and fraudulent misrepresentation claims as a matter

of state law (although on grounds different from those on which the district court relied), and it therefore did not address whether the *D'Oench* doctrine would also bar those claims. *Id.* at 16a-18a & n.5.

ARGUMENT

1. Petitioners argue primarily (Pet. 17, 19-25) that this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), suggest that the federal common-law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), was wholly supplanted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which amended and expanded 12 U.S.C. 1823(e) and first enacted 12 U.S.C. 1821(d)(9)(A). See generally App., *infra*, 1a-3a (describing history of *D'Oench* and the enactment of FIRREA); see FDIC Br. in Opp. at 2-6, *Hess* v. *FDIC*, 117 S. Ct. 760 (1997) (No. 96-106);[2] compare Pet. App. 11a and *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, No. 93-4634, 1997 WL 473101, at *4 (11th Cir. Aug. 20, 1997) (*Motorcity II*) ("Congress did not intend FIRREA to displace the *D'Oench* doctrine"), with *Ledo Financial Corp.* v. *Summers*, No. 94-56296, 1997 WL 472077, at *3-*4 (9th Cir. Aug. 20, 1997) (*Atherton* and *O'Melveney* preclude continued application of common-law *D'Oench* doctrine), *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995), and *Murphy* v. *FDIC*, 61 F.3d 34, 38-40 (D.C. Cir. 1995). This case does not present that issue.

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[2] We have provided petitioners with a copy of our brief in opposition in *Hess*.

Petitioners' claims are based on unwritten agreements, understandings, or representations allegedly made by the Bank or its officers in 1988 and early 1989, before FIRREA was enacted. See Pet. 10-13. Whether or not FIRREA supplanted *D'Oench* completely with respect to defenses or claims based on unwritten agreements allegedly entered into after FIRREA's enactment, it cannot be said to have supplanted the previously existing common law with respect to defenses or claims that are based on unwritten agreements that predate FIRREA, because the relevant statutory provisions added or amended by FIRREA, 12 U.S.C. 1821(d)(9) and 1823(e) (as amended), do not govern transactions that occurred before they were enacted.

As the FDIC explained in a Statement of Policy issued in February 1997, 62 Fed. Reg. 5984 (reprinted at App., *infra*, 1a-8a), no provision of FIRREA addresses the temporal reach of new Section 1821(d)(9) or amended Section 1823(e), and application of those provisions to agreements made before the statute was enacted would alter the rights that the parties to those agreements possessed when they acted.[3] Under

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[3] Before FIRREA, a borrower could assert an affirmative claim against the FDIC, or a defense against the FDIC as receiver, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of Section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460. For example, a borrower could rely on a written agreement executed by the bank's president but not approved by its board of directors or loan committee. Application of Section 1821(d)(9) and the expanded version of Section 1823(e) (as amended by FIRREA) would retroactively eliminate that right.

the principles articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), Congress must therefore be presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA. See App., *infra*, 6a-7a. Agreements made before that time, including the purported agreements or representations on which petitioners rely, are subject to pre-FIRREA law, including the federal common law then well established under *D'Oench*.[4]

Petitioners suggest in passing (Pet. 17 n.10, 19-20) that *D'Oench* might have been supplanted 39 years before the enactment of FIRREA, when Section 1823(e) was first enacted. Petitioners did not present that argument in the court of appeals, and it may not appropriately be raised for the first time in this Court.[5] Even if it were properly presented, however,

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[4] If Section 1821(d)(9)(A), which was added by FIRREA, did apply to this case, it would bar petitioners' claims. That Section provides in pertinent part that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." See App., *infra*, 4a-5a (discussing applicability of Section 1821(d)(9)(A) to purported liabilities of a failed institution). Petitioners do not claim that the alleged agreement by the Bank to stand behind SAFIG's letter of credit meets the requirements enumerated in Section 1823(e).

[5] Similarly, petitioners, who first raised the matter in their petition for rehearing in the court of appeals, did not adequately preserve any argument (see Pet. 22-23) that, when the FDIC is acting in its receivership capacity, the federal interest is insufficient to support the application of *D'Oench*. See generally *Ledo Financial Corp.*, 1997 WL 472077, at *3-*4. (Indeed, petitioners did not raise their principal argument until then either.) That argument is therefore not properly presented

the contention is implausible. Unlike FIRREA, the Federal Deposit Insurance Act of 1950 could not be described as comprehensive legislation. Although Section 1823(e) as originally enacted codified the result reached by this Court on the particular facts of *D'Oench*, nothing in the text or history of the 1950 Act suggests a congressional intention to supplant the common-law doctrine entirely. See *Motorcity II*, 1997 WL 473101, at *4 n.6; *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, 83 F.3d 1317, 1332 (11th Cir. 1996) (*Motorcity I*), vacated *sub nom. Hess* v. *FDIC*, 117 S. Ct. 760 (1997), reinstated by *Motorcity II*, *supra*; *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986). In succeeding years, "innumerable cases in every circuit court of appeals * * * held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other." *Motorcity I*, 83 F.3d at 1333; see *id.* at 1325-1326 (collecting cases); FDIC Br. in Opp. at 3-5, *Hess* v.

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for this Court's review. In any event, the argument is without merit. As the Eleventh Circuit indicated in *Motorcity II*, see 1997 WL 473101, at *4, this Court based the *D'Oench* rule on a policy, embodied in the Federal Reserve Act, designed to protect the FDIC from misrepresentations that are made to induce or influence the FDIC's actions as the insurer of bank deposits. That policy is violated at the point where bank examiners would be unable to detect the unrecorded agreement and take prompt protective measures, regardless of the capacity in which the FDIC subsequently appears in litigation. See *Langley* v. *FDIC*, 484 U.S. 86,95 (1987) (construing Section 1823(e)). Moreover, FIRREA specifically amended Section 1823(e) and added Section 1821(d)(0)(A) to bar claims based on unrecorded agreements when the FDIC, acting in its receivership capacity, is a party; as we have noted (see note 4, *supra*), Section 1821(d)(9)(A) would bar petitioners' claims if it were applicable to this case.

FDIC, *supra* (No. 96-106) (same). No court has held that *D'Oench* was supplanted by the original enactment of Section 1823(e), and the overwhelming weight of judicial authority applying and developing the doctrine between 1950 and 1989 argues otherwise.

In any event, even if the *D'Oench* doctrine's application to transactions preceding FIRREA were open to serious question, the matter would not warrant this Court's review. Cases involving oral agreements or representations allegedly made in connection with such transactions comprise a finite set that is rapidly diminishing over time, and the FDIC's recent policy statement makes clear that the FDIC will not assert the common-law *D'Oench* doctrine in cases involving post-FIRREA transactions. See App., *infra*, 7a-8a. Whether the doctrine continues to apply in pre-FIRREA cases is therefore a question of little continuing importance.

2. Petitioners contend that their claims should not be barred under *D'Oench* because they relate to a purported liability of the Bank, rather than to a bank asset; because they do not, in petitioners' view, depend on an agreement with the Bank; and because petitioners were "wholly innocent parties" (Pet. 19), so that it would be inequitable to apply the doctrine to bar their claims. Pet. 15, 17-19, 28-29; see also Pet. 25-27. Those arguments are also of limited importance in view of the FDIC's decision not to assert the non-statutory *D'Oench* doctrine in cases involving post-FIRREA transactions. In any event, none of them has merit.

a. Petitioners would limit *D'Oench* to cases involving identified bank assets (such as a loan agreement that the FDIC seeks to enforce in accordance with its terms) because *D'Oench* itself involved such an asset.

See Pet. 17-18. That contention ignores the logic of the *D'Oench* opinion, which relied on "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures" (315 U.S. at 457) and "a general policy to protect the institution of banking from * * * secret agreements" (*id.* at 458) that were "designed to deceive the [bank's] creditors or [a] public authority" concerning the bank's financial condition, "or would tend to have that effect" (*id.* at 460). Those policies require that the FDIC have ready access to the information required to determine, accurately and sometimes very quickly, the solvency of any insured institution. Compare *Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987) (discussing parallel purposes of Section 1823(e)).

Just as it "need[ed] no argument" in *D'Oench* itself "to demonstrate that the integrity of ostensible assets has a direct relation to solvency" (315 U.S. at 461), it needs none to observe that exactly the same concern pertains to accurate disclosure of the bank's liabilities. A bank's balance sheet may be rendered unreliable, to the detriment of regulating authorities (including the FDIC) and the public, as easily by concealing a liability as by overstating the value of an asset: In either case, the result is to increase the difference between the bank's assets and liabilities, which is, by definition, the measure of the institution's capital strength or its insolvency. It would therefore make little sense to interpret *D'Oench* to prohibit one sort of manipulation, while permitting

the other.[6] The court of appeals in this case correctly joined every other court of appeals that has considered the issue in so holding. Pet. App. 14a-16a.[7]

b. Petitioners insist (Pet. 15) that their claims do not depend on any "agreement between [petitioners] and [the Bank], secret or otherwise." See also Pet. 5, 15-16 & n.9, 28-29. That is a surprising contention, because the gist of petitioners' grievance is that they transferred $550,000 to the Bank in reliance on representations that the Bank would ensure the satisfaction of a letter of credit issued by SAFIG (either by backing the letter itself, or by keeping the $550,000 in its possession so that it would be available to satisfy

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[6] Section 1821(d)(9)(A) of Title 12, enacted by FIRREA, likewise applies to claims based on purported bank liabilities unrelated to any specific asset. See generally note 4, *supra*. Subparagraph (B) of the same provision, for example, excepts from the scope of subparagraph (A) a particular type of non-asset-related liability—which would be unnecessary if such liabilities were not subject to subparagraph (A) in the first place.

[7] Petitioners argue (Pet. 26-27) that the Eleventh Circuit's decision in *Vernon* v. *FDIC*, 981 F.2d 1230 (1993), conflicts on this issue with the same court's later decision in *OPS Shopping Center, Inc.* v. *FDIC*, 992 F.2d 306 (1993). That is not correct. As the Eleventh Circuit has made clear, *Vernon* holds only that *D'Oench* does not bar "free-standing" tort claims, such as might arise out of "employment discrimination and automobile accidents"; it does bar all "claims which relate directly to regular banking transactions, memorialization of which should be reflected in regular banking records," even if those claims could be characterized as sounding in tort. *RTC* v. *Dunmar Corp.*, 43 F.3d 587, 594-595 (1995) (en banc), cert. denied, 116 S. Ct. 74 (1995); see also *OPS*, 992 F.2d at 310-311. *OPS* itself applied *D'Oench* to bar tort claims involving "the rights and obligations relating to the issuance of a letter of credit by the bank." *Id.* at 310.

SAFIG's obligation), and that the Bank then wrongfully refused to honor the letter of credit on demand. See, *e.g.*, Pet. 5; Pet. App. 9a, 11a-13a. It is also contrary to this Court's reasoning in *Langley*, which read the word "agreement" in Section 1823(e) (before its amendment by FIRREA) broadly to include a contract that the obligors claimed had been fraudulently induced, and which relied explicitly on *D'Oench*'s reference to any "*scheme or arrangement* whereby the banking authority * * * was likely to be misled." 484 U.S. at 92 (quoting *D'Oench*, 315 U.S. at 460) (emphasis added by *Langley*). Even if petitioners can formulate their allegations to avoid the word "agreement," their claims are directly related to ordinary banking transactions, and allowing them would materially impair the financial position of the Bank as it appeared from the Bank's books and records. *D'Oench* requires no more. See, *e.g.*, *RTC* v. *Dunmar Corp.*, 43 F.3d 587, 593-596 (11th Cir.) (en banc), cert. denied, 116 S. Ct. 74 (1995); *id.* at 595-596 (collecting cases); see note 7, *supra*.[8]

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[8] Petitioners cite only one case in support of their "no agreement" argument (Pet. 16 n.9, 28): *Jones* v. *RTC*, 7 F.3d 1006 (11th Cir. 1993). They fail to note that, in *Dunmar*, *supra*, the full Eleventh Circuit vacated the panel decision in *Jones*, reheard the case en banc, and held that *D'Oench* applied to bar the "tort" claims in that case (which "allege[d] oral agreements that additional monies could be loaned, that extensions could be granted, and that the bank would permit assumption of the mortgage by a qualified buyer"). 43 F.3d at 593. We also note that the court of appeals did not disturb the district court's holdings (Pet. App. 39a-42a, 56a-59a) that petitioners' claims for fraud, wrongful dishonor, and unfair trade practices were insufficient as a matter of state law. Those determinations under state law are independently sufficient to

c. Finally, petitioners argue (Pet. 19) that *D'Oench* does not apply because they are "wholly innocent parties." See Pet. 15-16, 27. A similar argument was rejected in *D'Oench* itself. 315 U.S. at 461. Indeed, *D'Oench* emphasized that the common-law rules it adapted to the context of the FDIC had been applied not only to persons who were "party to the scheme of deception," but also to those who had "no positive idea of committing any fraud upon any one" or even were "very ignorant and ill-informed of the character of the transaction." *Id.* at 458-459. The point of *D'Oench* has never been to punish wrongdoing, but rather to protect the federal deposit insurer and the public. See *id.* at 457, 460. Thus, just as, where *D'Oench* applies, "[p]ublic policy requires that a person who * * * executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced" (*id.* at 459), so too it requires that a person (particularly, as here, a sophisticated businessman) who allows a banking transaction to be documented without specific mention of what he conceives to be a $550,000 liability of the bank in his favor should bear the risk of the bank's failure, at least in preference to the FDIC and the public interests that it represents. Compare *Langley*, 484 U.S. at 92-93; see *FDIC* v. *McCullough*, 911 F.2d 593, 600-601 (11th Cir. 1990) (en banc), cert. denied, 500 U.S. 941 (1991).

Petitioners' contrary argument finds support only in the Ninth Circuit's dated decision in *FDIC* v. *Meo*, 505 F.2d 790 (1974), which has been criticized by other

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support the judgment below, and they do not merit review by this Court.

courts of appeals (see, *e.g.*, Pet. App. 13a-14a; *Dendinger* v. *First Nat'l Corp.*, 16 F.3d 99, 102 (5th Cir. 1994); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1338, 1347 (1st Cir. 1992)) and severely limited by the Ninth Circuit itself (see *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 495-496 & n.2 (1995) ("even if Brookside acted in good faith, by signing the note subject to an unrecorded agreement, [it] lent itself to an arrangement likely to mislead the RTC"). The court below in this case correctly joined the other courts that have rejected the application of any "innocence exception" to the bar imposed by *D'Oench* (Pet. App. 13a-14a), and the matter does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

62 Fed. Reg. 5984

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership

[Monday, February 10, 1997]

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Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an

addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections.[*]

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protecting FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 64 Stat. 889 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

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[*] The Guidelines referred to in the text are not reprinted here, but may be found at 62 Fed. Reg. 5985-5988.

In August 1989, as part of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA), Public Law 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) Is in writing,

(B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)(9)(A)), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim

against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to

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[1] The Guidelines have been in effect since late 1994.

rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes." *Langley*, 484 U.S. at 92-93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of sec-

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[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John* v. *RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen* v. *Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

tion 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addresses the temporal reach of section 1821(d)(9) or section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to

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[3] See *Oklahoma Radio Assocs.* v. *FDIC*, 987 F.2d 685, 695-96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy* v. *FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC's concession in that regard).

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460.

have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish "a categorical recording scheme" (see *Langley*, 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93-95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

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[5] The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no "reason to think that all the diverse provisions of the [statute] must be treated uniformly for" purposes of the retroactivity analysis. *Landgraf* v. *USI Film Prods.*, 511 U.S. at 280, 114 S. Ct. at 1505. Moreover, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,
Executive Secretary.

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